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No. 82-262

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA;
STATE PERSONNEL BOARD STATE OF CALIFORNIA;
BOARD OF ADMINISTRATION OF
THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Petitioners,

VS.

RETIRED PUBLIC EMPLOYEES' ASSOCIATION OF
CALIFORNIA, CHAPTER 22, ET AL., AND
JACOB GUNN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PHILIP PAUL BOWE*
FRED DELAPPE LONSDALE
DAVIS, COWELL & BOWE
351 California Street, 4th Floor
San Francisco, CA 94104
Telephone (415) 433-7200
Attorneys for Respondents, Retired Public Employees' Association of California, Chapter 22, et al.

BERNARD L. ALLAMANO
PHILIP E. CALLIS*
California State Employees' Assn.
160 Franklin Street, Suite 302
Oakland, CA 94607
Telephone (415) 835-1900
Attorneys for Respondents Jacob Gunn, et al.
*COUNSEL OF RECORD

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does a retirement plan violate Title VII of the Civil Rights Act of 1964 if on its face it provides for different benefits for comparably situated individuals based solely on the sex of the individual?

2. Was the remedy of prospective equalization of retirement benefits from the date of this Court's decision in *Los Angeles Department of Water and Power v. Manhart*, for individuals who retired after Title VII was made applicable to state and local government employees, within the discretion of the court below?[1]

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[1]The petitioners raise a third issue concerning the two-year statute of limitations created by 42 U.S.C. § 2000e-5(g). Given the fact that the relief in this case begins only from the date of this Court's decision in *Manhart*, a date *subsequent* to the filing of this lawsuit, this two-year limitation period is not at issue in this case.

TABLE OF CONTENTS

	Page
Questions presented	i
Statement of the case	1
Argument	3
I	
Unequal sex-based retirement benefits violate Title VII	3
A. Manhart forbids disparate treatment of men and women in the payment of retirement benefits	3
B. Sex-based actuarial tables fail to treat individuals as individuals	4
C. A practice which on its face discriminates on the basis of sex violates Title VII	6
II	
The remedy herein is appropriate	7
A. The relief approved by the court of appeals is consistent with Manhart	7
B. The courts below properly weighed equitable considerations	10
C. The two-year back pay limitation in Title VII does not bar relief in this case	11
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

	Page
Abbott v. City of Los Angeles, 50 Cal.2d 438 (1958)	8
Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)	11, 12
Anderson v. City of Long Beach, 171 Cal.App.2d 699 (1959)	7
Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969)	10
Dillon v. Pension Commrs., 18 Cal.2d 427 (1941)	7
Dunham v. City of Berkeley, 7 Cal.App.3d 508 (1970)	7
EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978)	4
Fitzpatrick v. Bitzer, 390 F.Supp. 278 (D.Conn. 1974), affirmed on this issue 519 F.2d 559 (2d Cir. 1975), affirmed in relevant part 427 U.S. 445 (1976)	10
Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978)	passim
Marsille v. City of Santa Ana, 64 Cal.App.3d 764 (1976)	7
Norman v. Missouri Pacific Railroad, 497 F.2d 594 (8th Cir. 1974) [cert. denied, 420 U.S. 980 (1975)]	8
Norris v. Arizona Gov. Comm., 486 F.Supp. 645 (D. Ariz. 1980)	4, 10
Peters v. Wayne State Univ., 476 F.Supp. 1343 (E.D. Mich. 1979)	4
Spirt v. Teachers' Insurance & Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979)	4
Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971)	5
United States v. St. Louis San Francisco Ry. [Frisco], 464 F.2d 301 (8th Cir. 1973)	8
Women in City Gov't United v. City of New York, 515 F.Supp. 295 (S.D.N.Y. 1981)	4

TABLE OF AUTHORITIES CITED

Statutes

	Page
California Government Code, 20600.1	2, 9
Civil Rights Act of 1964, Title VII, 42 U.S.C.:	
Section 2000e-5(g)	i, 1, 2, 3, 4, 9, 10, 11
Section 2002-2(a)(1)	6

Rules

Rules of the Supreme Court, Rule 17	12

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a class action brought on September 7, 1977, by certain retired employees of state and local employers who are members of the Public Employees' Retirement System of the State of California.[2] This action was brought to redress violation of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et

[2]The second of the consolidated cases, *Gunn v. State of California*, was filed in 1978. The correct name of the consolidated case is *Retired Public Employees' Association of California, Chapter 22, et al., and Jacob Gunn, et al., v. State of California, et al.*

seq. The action sought to end the State's practice of paying different retirement benefits to similarly situated individuals based solely on the sex of the individual retiree.[3]

The Public Employees' Retirement System (PERS) includes members who are state employees as well as employees of local public entities which participate in the system. Contributions are made by both employees and employers. Benefits, however, are paid to retired employees based on statutory formulae which take into consideration the employee's years of service and final compensation, and not these contributions.

On March 24, 1972, Title VII became applicable to public employees. Finally, five years later, on January 1, 1977, the State took some measures to partially comply with Title VII by eliminating the use of sex-based actuarial tables in the computation of benefits for those individuals who were to retire after January 1, 1977. This action did nothing to eliminate discriminatory payments to retirees. Inexplicably, the State changed its position and later in 1977 amended the statute to allow the use of sex-based tables in computing retirement benefits for individuals who chose benefits other than the unmodified allowance. Cal. Gov't Code § 20600.1.[4] These optional settlements,

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[3]The case was also brought against the Retirement Board of the Oakland Municipal Employees' Retirement System. However, settlement was reached with that system providing for the prospective equalization of retirement benefits from the date of *Manhart* forward.

[4]Cal. Gov't Code § 20600.1.

Notwithstanding any other provision of this part, separate rates of contributions for male and female members shall not be established or maintained, nor shall different benefit factors be established for male and female members in the same category,

acknowledged by the State to be benefits (see Petition, page 19), were still being computed and paid in a manner contrary to the trial court's order of May 1979, even after the Ninth Circuit decision of May 1982.

Because the Public Employees' Retirement System relies on sex-based actuarial tables, a man and a woman, although similarly situated in all aspects of their work, receive different retirement benefits solely because of the assumption that women as a group live longer than men.[5]

ARGUMENT

I

UNEQUAL SEX-BASED RETIREMENT BENEFITS VIOLATE TITLE VII

A. Manhart Forbids Disparate Treatment of Men and Women in the Payment of Retirement Benefits

This case very simply is the other side of the coin of *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). The petitioners, however, are asking this Court to re-decide the *Manhart* case and are raising as an issue the fact that both men and women are the subject of the discrimination found unlawful by this Court in *Manhart*. This request for a re-decision is totally unnecessary in view of the fact that every court of appeals and district court which has considered a similar case involving benefits (as opposed to contributions) has easily

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provided, that this section shall not apply to the computation of the actuarial equivalents required under this part for the determination of optional payments.

The amendments to this section at the 1977-78 Regular Session of the Legislature shall be operative from January 1, 1977.

[5]The only exception was individuals retiring at a target age of 60, at which point benefits were equal.

reached the conclusion that a plan which discriminates on the basis of sex in the payment of benefits is in violation of Title VII. See e.g. *EEOC v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978); *Women in City Gov't United v. City of New York*, 515 F.Supp. 295 (S.D.N.Y. 1981); *Norris v. Arizona Gov. Comm.*, 486 F.Supp. 645 (D.Ariz. 1980) aff'd 671 F.2d 330 (9th Cir. 1982); *Peters v. Wayne State Univ.*, 476 F.Supp. 1343 (E.D.Mich. 1979); *Spirt v. Teachers' Insurance & Annuity Ass'n*, 475 F.Supp. 1298 (S.D.N.Y. 1979).

The petition herein is simply a further attempt by the State to delay and avoid implementation of the clear guidelines set forth by this Court in *Manhart* more than four years ago. The arguments raised in the petition have been raised and rejected in the trial court in a motion for summary judgment, a motion on the remedy, and again in a motion for reconsideration of the court's remedy, and again in the court of appeals. All the facts and circumstances of this case were thoroughly and exhaustively considered by both the district court and the court of appeals, and each found that there was a violation of Title VII, and that as to those individuals retiring after Title VII became applicable to state and local government entities, prospective relief should be ordered beginning from the date of this Court's decision in *Manhart*. No useful purpose would be served by granting certiorari to reconsider these questions.

B. Sex-based Actuarial Tables Fail to Treat Individuals as Individuals

This Court's decision in *Manhart* is premised on the principle that men and women should be treated as individuals and not as members of a gender classification.

For that reason, actuarial assumptions, even valid actuarial assumptions, about the longevity of groups cannot be used as an excuse to justify discrimination against individual members of those groups. In *Manhart* the lower court ordered an injunction prospectively preventing the City of Los Angeles from using sex-based actuarial tables the result of which would be to exact unequal contributions from men and women based solely on gender. The instant case is based on the application of those same assumptions where sex-based actuarial tables are used to compute benefits. Thus, petitioners are asking this Court whether it really meant what was said so clearly in the *Manhart* decision.

Petitioners seek to distinguish *Manhart* on the basis that in *Manhart* the unequal contributions discriminated only against women, whereas in the instant case these same actuarial assumptions operate to discriminate against both men and women. The Ninth Circuit easily rejected this argument, noting that the plain language of the statute makes it unlawful to discriminate against any *individual* on the basis of that individual's sex. With some exceptions not relevant here, an individual can retire from PERS only once. If that individual is treated on retirement in a manner which but for the person's sex would be different, that individual can take little solace in the knowledge that others of the same sex who retire at other ages will be treated differently and may even escape discrimination. Title VII was designed by Congress to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). That congressional mandate requires that when unequal treatment on the basis

of sex is shown, federal courts take action to eliminate the resulting discriminatory treatment. As the Court explained in *Manhart*,

> "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." 435 U.S. at 708

C. A Practice Which on Its Face Discriminates on the Basis of Sex Violates Title VII

While concepts such as "barrier to employment opportunities" are helpful in determining whether an ambiguous employment practice is discriminatory, these concepts do not supersede the language of the statute itself. Title VII, as clearly as it could be stated, makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The language of the Court in *Manhart* could apply with equal force in the instant case:

> "An employment practice which requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman rather than a man is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different'." 435 U.S. at 711.

The practices of the Public Employees' Retirement System fail to pass this most basic test, and by substituting the concept of "benefit" for "contribution," the language of the Court in *Manhart* applies with the same force and effect.

While the State urges that this is a fundamental question which needs to be resolved, it is clear on even a cursory examination that the Court has already answered the question clearly and forcefully in the *Manhart* decision.

II

THE REMEDY HEREIN IS APPROPRIATE

A. The Relief Approved by the Court of Appeals is Consistent with Manhart

In addition to attacking the merits of the decision, the petitioners also seek to have the Court review the remedy fashioned by the district court and the court of appeals, a remedy which fully complies with the guidelines set forth by this Court in *Manhart*.

Courts in California have repeatedly ordered public retirement systems to make adjustments in the benefits due individuals already retired where it has been shown that the benefits being paid were improper. See, e.g., *Dunham v. City of Berkeley*, 7 Cal.App.3d 508 (1970); *Anderson v. City of Long Beach*, 171 Cal.App.2d 699 (1959); see also *Marsille v. City of Santa Ana*, 64 Cal.App.3d 764 (1976).

The California Supreme Court has held in cases involving pension benefits that the limitation on the right to sue for each installment commences from the due date of the particular installment. *Dillon v. Pension Commrs.*, 18 Cal. 2d 427 (1941):

> "The right to receive periodic payments under a pension is a continuing one (see *Dryden v. Board of*

> *Pension Commrs.*, 6 Cal. (2d) 575 [59 Pac. (2d) 104]), and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due."

See also *Abbott v. City of Los Angeles*, 50 Cal.2d 438 (1958).

The State, however, argues that Part IV of the *Manhart* decision, which dealt with back pay relief, somehow bars prospective relief in the instant case. The State relies on the case of *Norman v. Missouri Pacific Railroad*, 497 F.2d 594, 597 (8th Cir. 1974) [cert. denied, 420 U.S. 980 (1975)], quoting language out of context although the case has absolutely no application to the facts at hand.

Norman involved a claim by retired black train porters who asserted they would be receiving greater retirement benefits if they had been allowed to transfer to the craft of brakeman. The court held that the case was controlled by a decision on the same legal issues and similar facts in the Eighth Circuit decision in *United States v. St. Louis San Francisco Ry.* [*Frisco*], 464 F.2d 301 (8th Cir. 1973). In "Frisco," the Eighth Circuit had denied back pay to porters who had been denied transfers because no bad faith had been shown, and because these retired porters could not establish an "ascertainable standard for judging whether present unqualified train porters would otherwise have been qualified during the course of their employment to be brakemen but for racial discrimination." *Norman*, 497 F.2d, at 597. Because these very same factors were present in the porters' claim for retirement benefits, the court found this claim for enhanced retirement benefits was indistinguishable from the back pay claim previously denied in "Frisco."

While the language taken out of context may at first blush seem to support the State, the holding of the case does not. The State's reliance on this language taken out of context serves to illustrate the lack of support for their position. Only by a twisted logic can it be asserted that the prospective relief ordered by the courts herein is the equivalent of "back pay." The State has never equalized the retirement benefits for members of the class.

In *Manhart*, class members who were denied back pay were nevertheless granted injunctive relief which ended the unlawful practices of the city. In the instant case the State seeks to take away any remedy for those who are the victims of discrimination. As of the date of the *Manhart* decision, petitioners must have known that their practice was illegal for, despite their spurious argument that the plan is somehow saved because both men and women are the victims of discrimination, the principles laid down by the Court clearly established the course of action petitioners should have followed.

Despite petitioners' disingenuous protestations to the contrary, it must also be remembered that in the instant case not all the discrimination complained of has been eliminated. Retirees continue to receive unequal treatment, and the State in fact continues to reserve for itself by statute the right to continue discriminating in the benefits paid to members who choose optional settlements, even in the face of this trial court order forbidding such a practice. See Cal. Gov't Code § 20600.1.

The State seems to believe that *Manhart* constituted a piece of legislative action by the Court, making unlawful something which had previously been lawful. Title VII,

made applicable to state and local governments in 1972, is the legislative action which made the practice of paying some individuals lower monthly benefits based solely on the gender of that individual unlawful. The court below found that the relief granted to class members retiring after the effective date of Title VII exhibited the cautious approach mandated by *Manhart.*

In fact, as respondents pointed out below, the prospective equalization of retirement benefits is consistent with actions taken over and over again by district courts to remedy continuing violations of Title VII. See e.g. *Asbestos Workers Local 53 v. Vogler,* 407 F.2d 1047 (5th Cir. 1969). Such relief has specifically been approved in retirement cases such as *Fitzpatrick v. Bitzer,* 390 F.Supp. 278 (D.Conn. 1974), affirmed on this issue 519 F.2d 559 (2d Cir. 1975), affirmed in relevant part 427 U.S. 445 (1976), and *Norris v. Arizona Governing Committee, supra.*

B. The Courts Below Properly Weighed Equitable Considerations

The courts below considered all petitioners' equitable arguments, including the argument that the prospective correction of discrimination would have a severe economic impact, and found from petitioners' own financial records that the impact was in fact slight. Petitioners' own financial information showed that there was a residual reserve of $163 million dollars, while prospective relief would amount to only approximately $1.8 million dollars a year, in a system with over $10 billion in assets.

Petitioners are in fact requesting this Court to take on the job of having to decide *Manhart* over again and again and to further decide as to each retirement plan what

corrections to make, whether to award back pay, whether to award prospective relief, whether to award some combination of back pay and prospective relief, and so on. Petitioners assert that allowing the Ninth Circuit decision to stand will have the effect of leaving these decisions "in the discretion of district courts throughout the land." This, of course, is exactly where such decisions should be made. *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975). There are a myriad of different types of pension plans. This plan, which is not a purchase money plan, is unique in many ways. As this Court made clear in *Manhart,* decisions affecting pension plans must be made based on careful examination of the facts and circumstances in each case. The guidelines laid down by the *Manhart* decision set forth the areas of concern, but the district courts must be trusted to properly shape relief in each individual case.

C. The Two-Year Back Pay Limitation in Title VII Does Not Bar Relief in This Case

Finally, petitioners raise the application of the two-year back pay limitation in 42 U.S.C. § 2000e-5(g) as an issue requiring this Court's attention. This section of the statute, of course, has no application in the instant case since relief was not imposed except from a date well *after* the filing of charges with the commission, and in fact after the filing of this lawsuit.

CONCLUSION

The decision of the district court as modified by the court of appeals is neither clearly erroneous in its factual findings, nor is it an abuse of traditional discretion to locate a just result in light of the circumstances peculiar to the case. It is in fact a decision required by and totally consistent with this Court's holding in *Manhart*. Review by the Supreme Court by way of certiorari would simply grant yet another hearing on the merits and on the propriety of the remedy fashioned by the district court and the court of appeals. Rule 17 of the Rules of the Supreme Court sets forth some of the criteria which will be considered in determining whether special and important reasons call for review on a writ of certiorari. The reasons indicated in that rule include conflicting court of appeals' decisions and unsettled important questions of federal law. None of these considerations is present here. The lower courts which have considered cases involving retirement systems subsequent to *Manhart* have had no difficulty applying the rule of law laid down in that case.

The fashioning of appropriate relief must be made with a view to the particular facts and circumstances of each case and is not the sort of decision which can be made once and for all by this Court. This Court has laid down guidelines in cases such as *Albemarle Paper Company v. Moody* and in *Manhart* itself which fully set forth the considerations which should be weighed by a district court in fashioning appropriate relief. These directions were acknowledged and followed by both the district court and the

court of appeals in the instant case. Accordingly, respondents respectfully request that the petition for writ of certiorari to the Ninth Circuit Court of Appeals be denied.

Respectfully submitted,

PHILIP PAUL BOWE*
On behalf of the following attorneys and respondents.

FRED DELAPPE LONSDALE
DAVIS, COWELL & BOWE
Attorneys for Respondents, Retired Public Employees' Association of California, Chapter 22, et al.

BERNARD L. ALLAMANO
PHILIP E. CALLIS*
Attorneys for Respondents Jacob Gunn, et al.
*COUNSEL OF RECORD